IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TERRENCE JONES,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No. 00 C 5776**
	)	
PACIFIC RAIL SERVICES,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

This case is before the Court on defendant Pacific Rail Services' motion pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss Count 2 of plaintiff Terrence Jones' amended complaint. In Count 2, Jones alleges that Pacific Rail violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)-2(a)(2), by failing to take corrective action after Jones said he had been harassed by a coworker because he did not conform to male sexual stereotypes. The Court denies Pacific Rail's motion to dismiss for the reasons stated below.

FACTUAL BACKGROUND

Terrence Jones has been employed by Pacific Rail Services as a groundsman/spotter since February 8, 1999. Compl. ¶8. He alleges that he was harassed by a male coworker named Fred, who made repeated statements to him in the men's locker room such as "your hands are so soft – what are you doing after work?" and "why don't you come strip for me?" *Id.* ¶¶13-14. Jones claims that he

complained to Pacific Rail in the spring of 1999 and throughout 2000 but that the company took no corrective action to end the harassment. *Id.* ¶15.

In Count 1, Jones alleges that Fred's actions created a work environment that was hostile based on his sex. In Count 2, he alleges that Fred's actions constituted harassment based on Jones' non-conformance to sexual stereotypes. Though it is not entirely clear to the Court how exactly these two claims differ from each other, Jones has pled them separately, and Pacific Rail likewise sees them as posing separate legal theories: it has answered Count 1 but has moved to dismiss Count 2.

DISCUSSION

On a motion to dismiss, the Court accepts as true all well-pleaded allegations in the complaint, *see Miree v. Dekalb County*, 433 U.S. 25, 27 n.2 (1977); *Turner/Ozanne v. Hyman/Power*, 111 F.3d 1312, 1319 (7th Cir. 1997), and it reads the complaint liberally, dismissing only "if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which entitles him to relief." *Conley v. Gibson*, 355 U.S. 41, 45 (1957). With these standards in mind, the Court assesses Pacific Rail's motion to dismiss.

Jones alleges in Count 2 that Pacific Rail violated Title VII by failing to take corrective action after he complained of harassment by a male coworker that was based on the fact that Jones did not conform to male sexual stereotypes. The Supreme Court has held that workplace harassment can violate Title VII even "when the harasser and the harassed employee are of the same sex." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 76 (1998). The Court identified several ways in which a showing of same-sex harassment could be made: by proof that the harasser was motivated by sexual desire toward members of his own gender; by proof of gender-specific statements from which

an inference can be drawn that "the harasser is motivated by general hostility towards the presence of members of the same sex in the workplace"; and/or by comparative evidence showing differences in how the harasser treated members of the two sexes. *Id.* at 80-81. In any such case, the Court said, the touchstone "is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the opposite sex are not exposed." *Id.* at 80 (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 25 (1993)(Ginsburg, J., concurring)).

Oncale does not on its face preclude a plaintiff from advancing a theory of same-sex harassment based on his perceived non-conformance to gender-based stereotypes. Actionable sexual harassment by members of the opposite sex has never been limited to cases involving sexual advances but has long included harassment based on a woman's failure to meet stereotyped expectations of femininity. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989). The Court sees no reason why it should be any different in a case of alleged harassment by a member of the same sex as the victim. Indeed, the Court made it clear in *Oncale* that sexual harassment is to be evaluated by one standard whether perpetrated by a member of the same sex or the opposite sex of the victim: namely whether the plaintiff was "exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale*, 523 U.S. at 80.

In *Doe v. City of Belleville,* 119 F.3d 563 (7th Cir. 1998), *vacated and remanded,* 523 U.S. 1001 (1998), the Seventh Circuit upheld a claim of sexual harassment brought by two brothers who quit their jobs after being subjected to harassment by male coworkers and a male supervisor. It provided two separate rationales for its conclusion that the plaintiffs had been harassed because of their gender. First, the court held that harassment that involves explicit sexual overtones is always

actionable, regardless of the harasser's sex, sexual orientation, or motivation. *Id.* at 576. It is relatively clear that this rationale was abrogated by *Oncale*, in which the Supreme Court noted that it had "never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words have sexual content or connotations." *Oncale*, 523 U.S. at 80.

But *Doe* also included a second rationale, namely that "Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles." *Id.* at 580. The court explained that "[a] man who is harassed because his voice is soft, his physique is slight, his hair long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of' his sex." *Id.* at 581. We see nothing in *Oncale*, or in the Court's decision to vacate and remand *Doe* for reconsideration in light of *Oncale*, to indicate that the Seventh Circuit's second rationale is no longer viable. Other district courts within this Circuit have adopted *Doe's* second rationale even after *Oncale*, and we do the same. *See Spearman v. Ford Motor Company*, No. 98 C 452, 1999 WL 754568, at *5-6 (N.D. Ill. Sept. 9, 1999); *EEOC v. Trugreen Limited Partnership*, 122 F.Supp.2d 986, 993 (W.D. Wis. 1999). *Accord*, *Higgins v. New Balance Athletic Shoe, Inc.* 194 F.3d 252, 261 n.4 (1st Cir. 1999). *See generally Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1009 (7th Cir. 1999) (examples in *Oncale* of how actionable same-sex harassment can be proved were meant to be instructive, not exhaustive; plaintiff may use any means of proof which "demonstrates in some manner that he would not have been treated in the same way had he been a woman.").

In sum, Jones' claim that Pacific Rail did not respond to his complaints that he was being harassed because of his alleged effeminacy is sufficient to state a claim. It remains to be seen, of course, whether Jones actually will be able to establish that he was harassed based on his gender, but that is an issue for another day.

CONCLUSION

For the reasons stated above, defendant's motion to dismiss Count 2 [Docket Item 7-1] is denied. Defendant is directed to answer Count 2 on or before February 28, 2001. The discovery schedule previously set by the Court remains in effect.

_____

MATTHEW F. KENNELLY
United States District Judge

Date: February 12, 2001